(G-130)

In The

Supreme Court of the United States

October Term, 1976

No. 76-616

THE STATE OF NEW YORK,

Appellant,

— against —

CATHEDRAL ACADEMY,

Appellee.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANT

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The appellant State of New York, pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, filed this Statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

Opinions Below

The Court of Appeals of the State of New York did not render any opinion, rather the majority reversed on the basis of the dissenting opinion in the New York Appellate Division of the New York Supreme Court, Third Judicial Department, and

the dissenting judges relied upon the majority opinion in the Appellate Division. A copy of the Court of Appeals Memorandum is set out in the Appendix hereto and marked as Appendix "A". There is as yet no citation of the Memorandum decision. The majority and dissenting opinions of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, are reported at 47 A D 2d 390, 366 N.Y.S. 2d 900. A copy of those opinions is set out in the Appendix hereto as Appendix "B". The opinion of the Court of Claims of the State of New York is reported at 77 Misc 2d 977, 354 N.Y.S. 2d 370.

Jurisdiction

This is an appeal from a final order of the Court of Appeals of the State of New York reversing an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, which affirmed the judgment of the New York State Court of Claims dismissing the claim which had been filed pursuant to chapter 996 of the New York Laws of 1972, and which sought reimbursement for certain expenses for the 1971-72 school year which would have been paid by the State but for the declaration of unconstitutionality of the underlying statutory authorization for payment by this Court in *Levitt* v. *Committee for Public Education and Religious Liberty* (413 U.S. 472 [1973]). The claim here involved is one of more than 2,000 claims filed pursuant to chapter 996, which was selected for trial to test the validity of chapter 996. The dismissal of the claim by the Court of Claims and the affirmance by the Appellate Division of the State Supreme Court were based on holdings that payments pursuant to chapter 996 would be in violation of the First Amendment to the Constitution of the United States. The reversal by the New York Court of Appeals was based on the dissenting opinion of then Presiding Justice HERLIHY in the Appellate Division which would have held the statute and claim thereunder valid under the decision of this Court in *Lemon* v. *Kurtzman* (411

U.S. 192 [referred to hereafter as *Lemon II*]), and would have had the Court of Claims in each case adjudicate the question of whether or not the amounts claimed for reimbursement constitute a furtherance of the religious purposes of the claimant.

The order of the Court of Appeals appealed from was entered on July 13, 1976. A copy of the order is set out in the Appendix as Appendix "C". Notice of Appeal was filed with the Court of Claims of the State of New York on September 1, 1976. A copy of the Notice of Appeal is set out in the Appendix hereto as Appendix "D".

Although the order of the New York Court of Appeals reinstates the claim and remands it to the New York Court of Claims for trial, it is submitted that this Court has jurisdiction to hear this appeal as an appeal from a final order on two grounds. First, the decision of the Court of Appeals is final as to the question of the constitutionality of the underlying statute. That issue is not again triable in the Court of Claims on remand. Further, since the Court of Claims' jurisdiction on remand is to determine the amount of payment only, it is possible that there could be no further appeal in State courts because the issue of constitutionality will be *res judicata* in those courts, thus barring an appeal to this Court on the constitutional issue.

Secondly, we submit that the decision of the New York Court of Appeals, on the dissenting opinion in the Appellate Division, which suggested that, on the audit of the claim by the Court of Claims, the Court could try the issue in each case of whether or not the services or tests were sectarian in nature or utilized for sectarian purposes or whether the funds to be paid would be devoted to religious uses, itself creates a situation of excessive entanglement between government and religion and thus interjects a new element of unconstitutionality into this case.

Consequently, we submit that, despite the form of the Court of Appeals order, this Court has jurisdiction to review by direct appeal the order above cited pursuant to the terms of 28 United States Code, Sec. 1257(2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (hereinafter referred to as *Lemon I*); *Lemon* v. *Kurtzman* (II), *supra*; *Levitt* v. *Committee for Public Education and Religious Liberty*, *supra*.

Statute Involved

Chapter 996 of the New York Laws of 1972, provides as follows in pertinent part (the full text is set out as Appendix "E" hereto):

> "Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

> Sec. 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, inter alia:
>
> (a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;
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> * * *
>
> (c) That . . . appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;
>
> * * *
>
> (e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;
>
> * * *
>
> Sec. 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable . . . ."

Questions Presented

1. Where a statute authorizing payments to nonpublic schools for testing and record-keeping services was held to be unconstitutional by this Court as violating the First Amendment to the Constitution of the United States, does that declaration of invalidity bar the New York State Legislature from

authorizing the filing of claims in the New York State Court of Claims for reimbursement of the payments so held to be unconstitutional for the remainder of the school year in which the statute was declared unconstitutional?

2. Regardless of the prior decisions of this Court relative to the underlying statute, would the payment of the claim herein constitute a violation of the Establishment of Religion Clause of the First Amendment to the Constitution of the United States?

3. Regardless of the prior decision of this Court relative to the underlying statute, would the audit of this claim by the State Court of Claims, including an examination of the use of the funds and the services rendered in each case as envisaged by the Court of Appeals decision, to determine whether sectarian uses were involved, constitute a violation of the Establishment Clause?

Statement of the Case

In 1970, the New York State Legislature appropriated $28,000,000 to compensate nonpublic schools for the expenses of record-keeping and testing required by State law or regulation (chapter 138 of the New York Laws of 1970). That statute, effective July 1, 1970, was the subject of an action, commenced June 30, 1970, in the United States District Court for the Southern District of New York, entitled *Committee for Public Education and Religious Liberty, et al.* v. *Levitt and Nyquist.* Cathedral Academy, appellee herein, and several other nonpublic schools were granted leave to intervene in the action as parties defendant. Although the action was commenced before the effective date of the act, no preliminary injunction was sought, at that time, to restrain payments pursuant to the statute. Consequently, appellee and other nonpublic schools received payments under the act for the entire 1970-71 school year and received the first of two payments scheduled for the 1971-72 school year. On

April 11, 1972, four days before the earliest date on which the second payment for that year could have been made, a three-judge United States District Court issued a preliminary injunction restraining the making of that payment, and, on April 27, 1972, handed down a final decision in which the majority held chapter 138 to be unconstitutional as in violation of the Establishment Clause of the First Amendment to the Constitution of the United States (342 F. Supp. 439). The defendants in that case, including appellee herein, appealed to the Supreme Court of the United States, which affirmed the District Court judgment (*Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 [1973]).

Immediately following the District Court decision, the New York State Legislature passed a bill which became chapter 996 of the Laws of 1972, authorizing the New York State Court of Claims to hear and determine claims by nonpublic schools for reimbursement for the remaining sums which they would have received in 1972, but for the District Court decision.

Cathedral Academy is one of the over 2,000 schools which filed claims aggregating approximately $11,000,000. The claim herein, for $7,347.29, represents the sum appellee would have received in the latter part of the 1971-72 school year, pursuant to chapter 138, but for the holding of unconstitutionality. This claim was selected as a test case as to the validity of chapter 996. Appellee moved for summary judgment and the State cross-moved for the dismissal of the claim.

The State Court of Claims, by decision dated April 2, 1974, dismissed the claim, basing its determination on the holding of this Court in the *Levitt* case, *supra*, which held that the statute which preceded chapter 996, *viz.*, chapter 138 of the Laws of 1970, was unconstitutional. In so doing, the Court of Claims held that this implementation of chapter 996, in the form of an award to the claimant (appellee herein) would be constitutionally impermissible as violative of the Establishment Clause of the First Amendment to the Constitution of the

United States. The decision was specifically based upon the opinion of Chief Justice BURGER in *Levitt*, particularly the holdings that teacher-prepared tests were an integral part of the teaching process which posed a substantial risk of their use in the inculcation of religion and that the lump sum, per pupil allotment of funds, pursuant to chapter 138, prevented the reduction of the allotment by elimination of reimbursement for such tests.

Analyzing the provisions of chapter 138 of the Laws of 1970 and chapter 996 of the Laws of 1972, the State Court of Claims found that claims pursuant to chapter 996 are based upon payment for services rendered under chapter 138 and that an award to the claimant would result in the resurrection of chapter 138, which this Court had declared to be unconstitutional. The Court also considered and rejected the claimant's contention that payment under chapter 996 is authorized by the holding of this Court in *Lemon II, supra*. The Court distinguished the two cases on the basis that the underlying statute at issue in *Lemon* had been held unconstitutional because it resulted in excessive entanglement between government and religion, which entanglement had already occurred and would not result from the additional payment sought in *Lemon II*, while in *Cathedral* the payments were unconstitutional because they could be used for sectarian purposes and the assurance that they would not, present in *Lemon II*, was absent in *Cathedral*.

The Court of Claims in the instant action not only referred to the holding of this Court that the lump sum aid provided under chapter 138 was inseparable as between sectarian and secular uses, but also held that chapter 996 did not include any standards or guidelines by which the Court of Claims could make that separation. The Court concluded that those guidelines should be established by the Legislature, not the Court.

Judgment was entered in accordance with the decision on April 22, 1974. On May 13, 1974 claimant filed a notice of appeal.

On appeal, the Appellate Division of the New York Supreme Court, Third Judicial Department, affirmed the dismissal of the claim. Three justices, constituting the majority of that Court, rejected the applicability of this Court's decision in *Lemon II* to the facts of this case. That Court pointed out that this Court in *Lemon II* had found only a "remote possibility of constitutional harm" in the additional payment to the schools because the unconstitutional entanglement had already occurred and had already assured that the funds would not be used for sectarian purposes, whereas in the instant case such assurances could not be secured without excessive and unconstitutional entanglement in violation of the First Amendment.

The majority of the Appellate Division observed that the factor of greatest significance, leading to its decision, is that, in *Levitt*, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied.

The two members of that Court who dissented would have found a valid analogy with *Lemon II* and would further have found a moral obligation on the part of the State to make the one remaining payment for the 1971-72 school year. Significantly, the dissenting opinion of then Presiding Justice HERLIHY also observed that it was not the intention of the New York State Legislature that any funds be used for religious purposes and that the audit of the claims by the State Court of Claims would serve the same purpose as the post audit referred to in *Lemon II*, and that claimant must affirmatively prove that no funds will be used for religious purposes.

The order of the Appellate Division was entered on May 6, 1975 and on May 27, 1975, Cathedral Academy filed its Notice of Appeal to the New York State Court of Appeals.

The appeal was argued June 7, 1976. By decision, dated July 13, 1976, the Court of Appeals, by a vote of 4 to 3, reversed the order of the Appellate Division and reinstated the claim on the dissenting opinion of then Presiding Justice

HERLIHY at the Appellate Division. The three dissenting Judges voted to affirm on the majority opinion at the Appellate Division. Remittitur was entered July 13, 1976.

How the Federal Questions Are Presented

The State's motion to dismiss the claim was based on the grounds that chapter 996 was unconstitutional under both the First Amendment to the Constitution of the United States and various provisions of the New York State Constitution. The decision of the State Court of Claims, holding the statute unconstitutional, was based solely on the Federal constitutional provision, as was the affirmance by the Appellate Division, and reversal by the State Court of Appeals.

The Questions Are Substantial

Over a period of years, this Court has considered the question of what form of payments or aid may be provided to nonpublic schools or to children enrolled in them. The Court has held that school bus transportation may be provided to children attending sectarian schools *(Everson* v. *Board of Education*, 330 U.S. 1); that textbooks may be provided to children attending church-related schools *(Board of Education* v. *Allen*, 392 U.S. 236; *Meek* v. *Pittinger*, 421 U.S. 349); that public moneys may be spent for the construction of academic buildings at church-related colleges *(Tilton* v. *Richardson*, 403 U.S. 672); and has also held that payments may not be made either to schools or to individuals for the cost of teaching or teachers' salaries *(Lemon* v. *Kurtzman, I* and *II, supra);* nor to schools as reimbursement for the costs of record keeping and testing where teacher prepared tests are included in those for which reimbursement is provided *(Levitt* v. *Committee for Public Education and Religious Liberty, supra).*

The issue here is, fundamentally, whether, regardless of the guise under which the taxing power is invoked, the State may constitutionally use that power to furnish direct financial assistance to nonpublic schools which are controlled in whole or in part by religious denominations or in which denominational doctrines are taught. Every discussion on the impact of the First Amendment upon a state's taxing power begins with *Everson* v. *Board of Education, supra,* in which the issue was the provisions of a New Jersey statute permitting local school boards to provide transportation for students attending church schools. Mr. Justice BLACK, speaking for the majority of the Court, defined the scope of the Establishment Clause as follows (pp. 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." (Emphasis added.)

The opinion further states (p. 16):

> "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."

Fundamental to the concept of religious freedom, as envisaged by the framers of the First Amendment, was the belief that it was destructive of personal freedom to compel any man to pay taxes for religious purposes. Indeed, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes.

The Establishment Clause of the Federal Bill of Rights was based upon the awareness of the historical fact that governmentally established religions and religious persecution go hand in hand and on the belief that a union of government and religion tends to destroy government and degrade religion *(Engel* v. *Vitale*, 370 U.S. 421 [1962]).

While four Justices in *Everson* disagreed over the application of these principles to the facts of the case before them, it is important to observe that all of the dissenters agreed as to the principles therein defined. What is more, this definition of principle has been repeated and reaffirmed repeatedly since that decision (See, *e.g., Illinois ex rel. McCollum* v. *Board of Education of School District No. 71*, 333 U.S. 203 [1948]; *McGowan* v. *Maryland, supra; Torcaso* v. *Watkins*, 367 U.S. 488 [1961]; *Board of Education* v. *Allen, supra).*

When he reached the application of the principle to the New Jersey statute, Mr. Justice BLACK concluded (p. 18):

> "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."

The application of the *Everson* doctrine to the instant case is clear and unquestionable. Here the State *would* contribute money to the sectarian schools; it *would* support them, even if only once, by the payment of funds which would have been paid in 1972 except for the Federal Court injunction. A tax *would* be raised for the support of such schools and thus, for the support of the religion they teach.

A further test as to the validity of statutory enactments relative to interaction between Church and State, was set forth by this Court in *Abington School District* v. *Schempp* (374 U.S. 203 [1963]), a case involving a State law requiring daily Bible reading in the schools, wherein the Court stated (p. 222):

> "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

While the *purpose* of the statute here in question might not be the advancement of religion, the *primary effect* of monetary aid to sectarian schools would be the advancement of religion and thus, such aid would be barred by the terms of the First Amendment.

Mr. Justice CLARK'S test, first set out in *Abington*, was amplified by the Justice himself in *Religion and the Law* (15 S.C.L. Rev. 855, 859 (1963)):

> "The phrase 'respecting the establishment of religion' prohibits situations where the church and state are one; where the church may control the state and vice versa; and where there is some working arrangment between the two * * * Finally, the term includes the furnishing of funds for facilities by the state where the purpose and primary effect is to advance religion."

Even if we consider the formula used in *Abington* independently of the language of *Everson*, the conclusion as to the statute here at issue must be the same as that reached on the basis of the criteria set forth in *Everson.*

Prior to the enactment of chapter 138 of the Laws of 1970, the nonpublic schools were required to provide record keeping and examination services to the State at their own expense, and since the determination in *Levitt*, they have been required to do so again.* Funds paid pursuant to chapter 138, the

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* By chapters 507 and 508 of the Laws of 1974, nonpublic schools are being reimbursed for the actual expenses of required record keeping and administration of *State* prepared and mandated examinations. These statutes are the

Footnote cont'd. next page

Courts held, compensated the schools for a portion of the costs of administering the teaching functions of the schools. This Court in *Levitt* held this compensation to violate the Establishment Clause of the First Amendment.

The opinion of the Supreme Court of the United States in *Walz* v. *Tax Commission of New York City* (397 U.S. 664 [1970]), while rendered in a case involving tax exemption of church-owned property and not on the issue of direct financial aid to sectarian institutions, sets forth additional considerations to be employed in testing whether particular legislation violates the First Amendment. The test, as phrased by Chief Justice BURGER, is two-pronged (669):

> "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so."

The Court's decision focuses on whether the statute fosters "excessive entanglement" between government and religious institutions. Such entanglement is variously characterized as "sponsorship", "interference", and a relationship generating "confrontation and conflicts". Most pertinent to this action, is discussing the alternatives of taxing or exempting church property, the Chief Justice observed (675):

> "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for the enforcement of statutory or administrative standards * * *."

Footnote cont'd.

subject of an action *(Committee for Public Education and Religious Liberty* v. *Levitt)* in which the United States District Court for the Southern District of New York has held the statutes unconstitutional and in which a Notice of Appeal to this Court has been filed.

That decision makes it clear that the test of a statute's effect is not whether the secular result is more important than the religious result, nor whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive results against which the First Amendment guards.

Applying that decision, this Court in *Lemon I, supra*, held invalid a Pennsylvania statute providing for payments to nonpublic schools of the costs of teaching certain secular subjects. The extensive auditing provisions, to insure that no State funds were used for religious purposes, the Court found to constitute excessive entanglement between Church and State.

Claimant in the instant case bases its allegations of validity of chapter 996 of the Laws of 1972 on the decision of this Court in *Lemon II, supra.* The Court of Claims, however, clearly set out the distinguishing features between this case and that in *Lemon II,* distinctions which result in unconstitutionality in this case. The Trial Court here held:

> "Despite the holding in *Levitt*, claimant urges that *Lemon II* stands for the proposition that, even though a state statute may have been struck down under the Establishment Clause, nevertheless, when a claimant relies thereon, prior to the finding of unconstitutionality, in performing certain services with the expectation of reimbursement, which is not forthcoming, then, in right, justice, law and equity claimant should be reimbursed. As applied to the facts of the instant claim we disagree because in *Lemon II* the Supreme Court, after remand, found that any payments there allowed 'will not be applied for any sectarian purposes' (see pp. 202, 203), whereas in *Levitt* the Court found that 'the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities' (see p. 480).
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> * * *
>
> "The reimbursement in *Lemon II*, affirmed by the Supreme Court, was found allowable because of the very reason the statute was struck down, i.e., the excessive

entanglement by the State of Pennsylvania. Such process of oversight by the State, in the form of auditing, assured that State funds would not be applied for any sectarian purposes. Hence, the Supreme Court reasoned that, even assuming a cognizable constitutional interest in barring any state payments under the Pennsylvania statute, any payments to the schools would not and could not be applied by them in aid of sectarian purposes. That essential assurance is lacking in Chapters 138 and 996."

Rejecting the applicability of *Lemon II* to this case, the majority of the Appellate Division held:

"In striking down the Pennsylvania statute in *Lemon I*, the court focused upon the fact that the requirement of on-going scrutiny as above described fostered an 'excessive entanglement' between church schools and state. The validity of the payments themselves, on the facts there presented, was not determined—that issue did not arise until the question of reimbursement was raised in *Lemon II* (see 411 U.S. at 202). In allowing those payments to be made, the Supreme Court stated that reliance interests had significant weight in the shaping of an equitable remedy. However, those reliance interests were weighed not in a vacuum, but, rather, in the context of 'the remote possibility of constitutional harm * * *' *(Lemon II, supra,* 411 U.S. at 203). That remoteness was founded upon the fact that entanglements in the nature of inspection, audit, and the like had already occurred, wherefore 'payment * * * will compel no further State oversight of the instructional processes * * *'. Moreover, and perhaps more significant to a consideration of the case at bar, 'that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes.' *(Lemon II, supra,* 411 U.S. at 202.) In reaching this conclusion, the court took notice of the existence of an 'insoluble paradox' inherent in the fact that payments to religious schools could not be made without some assurance that they would be applied only to secular purposes, yet such assurances could not be provided without engaging in the forms of oversight constituting entanglements of a sort prohibited by *Lemon I.* In *Lemon II,* the 'insoluble paradox' was 'avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into [an] evaluation' of the payments to be made *(Lemon II, supra,*

411 U.S. at 203, n.3). In the case at bar, on the other hand, the paradox is squarely presented.

"We are of the view that the paradox cannot be resolved without sanctioning a violation of the religion clauses of the First Amendment, and therefore we affirm. The factor of greatest significance in leading us to this result is that in *Levitt,* the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied. Nor has any relationship been shown between the payment formula and such supposed secular purposes; as the court noted, '[e]xactly how the $27 and $45 figures were arrived at is somewhat unclear'. *(Levitt, supra, 413 U.S.* at 476, n. 4). For all its well-argued efforts to bring this case within the ambit of *Lemon II,* appellant has failed to demonstrate how payments under chapter 996 of the Laws of 1972 would differ in substance or form, in quality or quantity, from prohibited payments under the invalidated Mandated Services Act. [Footnote omitted] Thus, if payments are to be made under chapter 996 pursuant to the same formula as had been in effect under the Mandated Services Act, a finding that such payments would be unconstitutional because not limited to identifiable secular purposes is inescapable. If, on the other hand, chapter 996 contemplates that appellant and other schools are to be reimbursed only for actual costs incurred in performing the mandates services, some process of audit, inspection and supervision, invalid under the standards set up in *Lemon I,* would now be required.4/ Because of this

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"4/Presiding Justice Herlihy, arguing in his dissent that reimbursement should be permitted because of the reliance by the schools upon the expectation of payment, is of the view that reimbursement should be in such amount as would be determined by the trial court to equal the expenditures incurred in performing the services. This amount, as previously suggested, may be markedly different from the amount which appellant and others might have expected under the Mandated Services Act formula. We are unable to agree with the contention that because appellant and others similarly situated relied upon being paid in an amount determined according to that formula, they should be entitled to reimbursement in an amount which bears no demonstrated relationship to the payments which would have been forthcoming under that formula."

> fundamental distinction—the lack of an already-completed 'entangling' process—the constitutional interests at stake in the present case are weightier than those in *Lemon II*, and cannot be overcome by appellant's reliance arguments." (Emphasis added.)

Whereas in *Lemon* the unconstitutional factor was excessive entanglement and not unconstitutional direct aid to sectarian schools, in the instant case the unconstitutionality of the statute was based on the direct aid payments to the school. Chapter 996 would provide but one more such unconstitutional payment.

The New York Court of Appeals, however, reversed the Appellate Division decision and adopted the dissenting opinion of Presiding Justice HERLIHY in that Court. That opinion analogized the instant situation to that of the Pennsylvania schools in *Lemon II* and would have found the enabling act constitutional on the same basis. Further, that opinion, adopted by the majority in the Court of Appeals, would provide for an audit of each claim by the Court of Claims to determine the actual cost of the secular services rendered by the schools and that no money provided under the statute would be used for sectarian purposes. That audit would bring the instant case squarely within the auditing provisions found to be unconstitutional in *Lemon I*. The decision from which the appeal is taken would effect two violations of the First Amendment, first, by providing payment for services which have a primary effect of aiding religion and, second, by involving the government in excessive entanglement with religion in the auditing function.

The extensions of *Lemon II* to this or similar factual situations has not previously been considered by this Court. The question of the power of a State legislature to revive an unconstitutional statute, even for a single instance, is substantial as is the question raised by the Court of Appeals' decision as to whether the audit of the claim by the Court of Claims would add a further element of unconstitutionality.

CONCLUSION

APPELLANT RESPECTFULLY PRAYS THAT THIS COURT NOTE PROBABLE JURISDICTION IN THIS CAUSE AND PLACE THE CASE UPON THE CALENDAR FOR ARGUMENT.

Dated: October 20, 1976

Respectfully submitted,

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APPENDIX

APPENDIX A — Court of Appeals Memorandum.

State of New York
COURT OF APPEALS

Decisions

JULY 13, 1976

CASES

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3 No. 342
Cathedral Academy,
Appellant,
vs.
The State of New York,
Respondent.

Order reversed, with costs, and the claim reinstated on the dissenting opinion by then Presiding Justice J. Clarence Herlihy at the Appellate Division (47 A D 2d 390, 396).

All concur except Breitel, Ch.J., Jasen and Jones, JJ., who dissent and vote to affirm on the opinion by Mr. Justice Louis M. Greenblott at the Appellate Division.

#24780

SUPREME COURT
STATE OF NEW YORK

APPELLATE DIVISION—THIRD DEPARTMENT

CATHEDRAL ACADEMY,

Appellant,

—against—

STATE OF NEW YORK,

Respondent.

(Claim No. 56557.)

Argued, February 18, 1975.

Before:

HON. J. CLARENCE HERLIHY,
Presiding Justice,

HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. JOHN L. LARKIN,
Associate Justices.

APPEAL from a judgment entered April 22, 1974, upon a decision of the Court of Claims (William L. Ford, J.).

DAVIS, POLK & WARDWELL (Richard E. Nolan of counsel), for appellant, 1 Chase Manhattan Plaza, New York, New York 10005.

LOUIS J. LEFKOWITZ, Attorney General (Jean M. Coon and Ruth Kessler Toch of counsel), for respondent, The Capitol, Albany, New York 12224.

OPINION FOR AFFIRMANCE

GREENBLOTT, J.

By chapter 138 of the Laws of 1970, the New York State Legislature enacted the Mandated Services Act which provided that for school years beginning after July 1, 1970 qualifying non-public elementary and secondary schools would be reimbursed for the expenses incurred in providing various testing, record-keeping and related services which were required to be performed by separate statutory provision. The payments were not contingent upon performance of the services since said services were independently required. Reimbursement was to be in the form of two equal installments, the first payable up to March 15, the balance payable between April 15 and June 15. No requirement that recipient schools account for actual costs incurred was imposed; rather, payments were to be determined pursuant to a statutory formula whereby each school was to receive for each pupil in average daily attendance $27 in grades one through six and $45 in grades seven through twelve. These amounts were determined because in the judgment of representatives of the State Education Department, they were "reasonable" (*Levitt* v. *Committee for Public Educ. & Religious Liberty*, 413 U.S. 472, 476, n. 4).

In July, 1970 an action was commenced in United States District Court for the Southern District of New York, seeking to have the Mandated Services Act declared unconstitutional as violative of the religion clauses of the First Amendment to the Federal Constitution. It was not until April 27, 1972 that a three-judge court by a divided vote declared the Act unconstitutional, and on June 1, 1972 a final judgment was entered permanently enjoining reimbursement to non-public schools (*Committee for Public Educ. & Religious Liberty* v. *Levitt*, 342 F. Supp. 439). In the interim, the 1970-71 school year and most of the 1971-72 school year had been completed, and since the complainants had not sought temporary injunctive relief, appellant, a non-public school operated under the auspices of the Roman Catholic Church, Albany Diocese, as well as numerous other non-public schools, was actually reimbursed for the 1970-71 school year and for the first half of the 1971-72 school year. An appeal was taken to the United States Supreme Court which on June 25, 1973, by a vote of eight-to-one, affirmed the judgment of the District Court (*Levitt* v. *Committee for Public Educ. & Religious Liberty*, 413 U.S. 472, [hereinafter, *"Levitt"*]). In so doing, the court referred to its decision in *Lemon* v. *Kurtzman* (403 U.S. 602 [*Lemon I*]), and in noting the "potential for conflict" inherent in state payments to religious schools, held that because the state had failed to take any steps to assure that "state-supported activity is not being used for religious indoctrination • • • Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular

functions is not identifiable and separable from aid to sectarian activities" (*Levitt, supra,* 413 U.S. at 480).[1]

Subsequent to the District Court judgment, the New York State Legislature apparently took the view that non-public schools such as claimant had been placed in inequitable situations because they had already performed the services but could no longer be paid therefor under the invalidated Mandated Services Act. Accordingly, the Legislature enacted chapter 996 of the Laws of 1972 which, in essence, conferred jurisdiction on the Court of Claims to "hear, audit and determine" claims of eligible non-public schools for reimbursement of funds expended in the performance of services which had been required by law.[2] This appeal is from a decision of the Court of Claims dismissing the claim on the ground that chapter 996 violates the Establishment clause of the First Amendment. (It appears to be assumed by the parties that chapter 996 is intended to be limited in its application to reimbursing the schools solely for the second semester of the 1971-72 school year.) Appellant urges that equitable considerations, primarily

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[1] This is not to say that the State could necessarily provide such assurance in a manner which would survive constitutional scrutiny. In *Lemon I*, the basis for invalidating Pennsylvania's and Rhode Island's aid programs was, briefly, the extensive process of audit, inspection and oversight required by the State to provide the necessary assurances, thus fostering an "excessive entanglement" between church and State. We shall refer to this problem later.

For a further explanation of the reasons underlying the court's determination that the payments were in danger of being applied for religious purposes, the opinion of the court, and of the Court of Claims in the present case, should be examined.

[2] No claim is made that appellant and other non-public schools should be required to refund payments which have already been made.

the good faith reliance by appellant and other schools in fashioning their budgets in expectation of payment warranted remedial legislative intervention, and that precedent for upholding the validity of one-time payments can be found in *the decision* in *Lemon* v. *Kurtzman* (411 U.S. 192 [*Lemon II*]).

In *Lemon I*, the case was remanded to the District Court to fashion a decree, whereupon the latter court enjoined payments under the Pennsylvania statute (Pa. Stat. Ann., tit. 24, §§ 5601-5609) but permitted the State to reimburse non-public sectarian schools for services provided before the Supreme Court decision. (There, as here, no temporary injunctive relief had been sought.) Under the Pennsylvania statute there in question, non-public schools were to be reimbursed for certain education services pursuant to contracts with the state. The services consisted of furnishing teachers, texts and instructional materials in certain "secular" courses. In addition to compensating the schools, the state was to "undertake continuing surveillance of the instructional programs to insure that the services purchased were not provided in connection with 'any subject matter expressing religious teaching' • • • •" (*Lemon II, supra*, 411 U.S. at 195). The statute further required the schools to maintain separate funds and accounts pertaining to the services provided, which accounts were to be subject to audit by State officials.

In striking down the Pennsylvania statute in *Lemon I*, the court focused upon the fact that the requirement of on-going scrutiny as above described fostered an "excessive entanglement" between church schools and state. The validity of the payments themselves, on the facts there presented, was not determined—that issue did not arise until the question of reimbursement was raised in *Lemon II* (see 411 U.S. at 202). In allowing those payments to be made, the Supreme Court stated that reliance interests had significant weight in the shaping of an equitable remedy. However, those reliance interests were weighed not in a vacuum, but, rather, in the context of "the remote possibility of constitutional harm • • • •" (*Lemon II, supra*, 411 U.S. at 203). That remoteness was founded upon the fact that entanglements in the nature of inspection, audit, and the like had already occurred, wherefore "payment • • • will compel no further State oversight of the instructional processes • • • •". Moreover, and perhaps more significant to a consideration of the case at bar, "that very process of oversight—now an accomplished fact—assures that state funds will not be applied for any sectarian purposes." (*Lemon II, supra*, 411 U.S. at 202.) In reaching this conclusion, the court took notice of the existence of an "insoluble paradox" inherent in the fact that payments to religious schools could not be made without some assurance that they would be applied only to secular purposes, yet such assurances could not be provided without engaging in the forms of oversight constituting entanglements of a sort prohibited by *Lemon I*. In *Lemon II*, the "insoluble paradox" was "avoided because the entangling supervision prerequisite to state aid has already been accomplished and need not enter into [an] evaluation" of the payments to be made (*Lemon II, supra*, 411 U.S. at 203, n. 3). In the case at bar, on the other hand, the paradox is squarely presented.

We are of the view that the paradox cannot be resolved without sanctioning a violation of the religion clauses of the First Amendment, and therefore we affirm. The factor of greatest significance in leading us to this result is that in *Levitt*, the payments themselves were held to be unconstitutional because of the inability to identify secular purposes to which they would be applied. Nor has any relationship been shown between the payment formula and such supposed secular purposes; as the court noted, "[e]xactly how the $27 and $45 figures were arrived at is somewhat unclear." (*Levitt, supra*, 413 U.S. at 476, n. 4.) For all its well-argued efforts to bring this case within the ambit of *Lemon II*, appellant has failed to demonstrate how payments under chapter 996 of the Laws of 1972 would differ in substance or form, in quality or quantity, from prohibited payments under the invalidated Mandated Services Act.[3] Thus, if payments are to be made under chapter 996 pursuant to the same formula as had been in effect under the Mandated Services Act, a finding that such payments would be unconstitutional because not limited to identifiable secular purposes is inescapable. If, on the other hand, chapter 996 contemplates that appellant and other schools are to be reimbursed only for actual costs incurred in performing the mandates services, some process of audit, inspection and supervision, invalid under the

[3] In addition to the distinction based on the fact that the decision in *Lemon I* did not invalidate the payments per se under the Pennsylvania statute, it is also noteworthy that the Federal Court there undertook to fashion an equitable remedy by carving out an exception to the scope of the injunction. Here, the Federal court has not seen fit to do so; the injunction against payments stands, without limitation.

standards set up in *Lemon I*, would now be required.[4] Because of this fundamental distinction—the lack of an already-completed "entangling" process—the constitutional interests at stake in the present case are weightier than those in *Lemon II*, and cannot be overcome by appellant's reliance arguments.

Appellant argues, however, that those constitutional interests, just as the interests in *Lemon II*, will be "implicated only once under special circumstances that will not recur" (*Lemon II*, 411 U.S. at 202). In *Lemon II*, however, a constitutional interest arising from the payments was assumed for the purpose of discussion, since the constitutionality of the statute in *Lemon I* had not turned upon the invalidity of the payments per se, whereas in the present case, the constitutional interest is more tangible because of the invalidation of the payments under *Levitt*. Moreover, in this case, a further constitutional interest will be implicated because of the need for State oversight in the form, at the very least, of an audit process.

[4] Presiding Justice Herlihy, arguing in his dissent that reimbursement should be permitted because of the reliance by the schools upon the expectation of payment, is of the view that reimbursement should be in such amount as would be determined by the trial court to equal the expenditures incurred in performing the services. This amount, as previously suggested, may be markedly different from the amount which appellant and others might have expected under the Mandated Services Act formula. We are unable to agree with the contention that because appellant and others similarly situated relied upon being paid in an amount determined according to that formula, they should be entitled to reimbursement in an amount which bears no demonstrated relationship to the payments which would have been forthcoming under that formula.

We agree with the following remarks of the learned Judge in the Court of Claims:

> Sympathize as we do with this claimant, and the many others similarly situated, and recognize as we must their great and ongoing contributions to the education of over 800,000 young people in this State, and aware as we are of the serious financial problems directly facing the parochial schools, and indirectly, the public, we are, nevertheless, at the same time, constrained because of the Supreme Court decisions in *Levitt* and *Lemon II*, to deny reimbursement as being unconstitutional. (*Cathedral Academy* v. *State of New York*, 77 Misc 2d 977, 985.)

The judgment should be affirmed, without costs.

HERLIHY, P. J. (dissenting):

The Court of Claims dismissed the claim of Cathedral Academy solely on the ground that chapter 996 was violative of the Establishment Clause of the First Amendment and was, therefore, void. It is from that decision that this appeal has been brought.

The appellant contends that the Court of Claims misapprehended both the purpose and effect of chapter 996 and that rather it provides a constitutionally valid means to reimburse qualifying nonpublic schools for the second semester of the 1971-1972 academic year.

The majority opinion amply set forth the background of this proceeding and I agree with its conclusion that the basis for the finding of unconstitutionality in regard to the Mandated Services Act in *Levitt* v. *Committee for Public Educ. & Religious Liberty* (413 U.S. 472) (hereinafter referred to as *Levitt*) was different from the finding in the case of *Lemon* v. *Kurtzman* (403 U.S. 602 [*Lemon I*]). Nevertheless, the conclusion of the majority that the difference in the particular reason which required a declaration that the legislative enactment was unconstitutional would result in the one-time payment provided for in chapter 996 of the Laws of 1972 being different in nature or quality from that permitted in *Lemon* v. *Kurtzman* (411 U.S. 192 [*Lemon II*]) is not well founded.

Pursuant to chapter 996 of the Laws of 1972, there is to be a post audit to determine whether or not the mandated services had in fact been performed by the claimant.* While it is true that in *Lemon II* there had presumably been active supervision of the affairs of the school so as to insure that the acts for which reimbursement was to be made were not at least directly for religious purposes, the post audit, which in this case is to be performed by the Court of Claims, will necessarily establish whether or not the amounts claimed for mandated services constitute a furtherance of the religious purposes of the claimant. To be sure, there will be an indirect furtherance of the religious purposes of the claimant Academy insofar as the costs of the mandated services required budgetary allowances away from the religious purposes of the claimant. However, that would be no more true in the present case than it was in the *Lemon* cases. The fact of an implicit

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* The statute conferred jurisdiction on the Court of Claims to "hear, audit and determine" claims of eligible nonpublic schools. In *Levitt* there apparently was a tacit understanding that $27 per pupil would be paid for grades 1 through 6 and $45 per pupil for grades 1 through 12.

furtherance by any State assistance or aid to sectarian schools whether on a one-time basis or on a continuing basis was recognized in the majority opinion in *Lemon II* (see 411 U.S. at 202). As in the case of *Lemon II*, the single proposed payment for services rendered during the period of the presumed constitutionality of the former Mandated Services Act reflects no more than the school's reliance upon the promise of payment for their continuance to exist as institutions of education and providing a level of education required by the State. Indeed, the majority recognize that in *Lemon II* "a constitutional interest arising from the payments was assumed for the purpose of discussion" and yet would undermine the constitutional sanctioning of a one-time payment where there had been reliance upon a presumably constitutional enactment. The failings of the Mandated Services Act and the enactments of Pennsylvania and Rhode Island, while distinguishable for purposes of understanding what will not be permitted in regard to State enactments which provide aid to religious institutions, have no immediately perceivable impact upon the consideration of whether or not a subseqnent payment may be made for reliance where the statutes brought under constitutional attack are not upon their face patently an abridgement of the Constitution. The Legislature recognized a *moral* obligation to reimburse the schools for monies already budgeted and expended.

In *Lemon I* the court was confronted with substantially the same situation that existed in the *Levitt* action. The court in *Lemon I* observed at page 623:

> Here [*Lemon*] we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

The present action involving chapter 996 of the Laws of 1972 is more analogous with *Lemon II*, it being a "one shot" payment for services already performed.

In regard to *Lemon II*, the appellant states that as for the constitutional interests the court, after noting that the constitutional fulcrum of *Lemon I* was the excessive entanglement of church and state, observed that the one-time payment of $24,000,000 to nonpublic schools will not substantially undermine the constitutional interests at stake in *Lemon I*. The court also noted two problems having constitutional overtones but held that they were minimal or outweighed by reliance considerations.

The court held that the equities of the reliance by the nonpublic schools on the expectation of reimbursement outweighed the constitutional "interests".

In the present case the Court of Claims found that permitting the implementation of chapter 996 of the Laws of 1972 "would have the effect of resurrecting chapter 138 [of the Laws of 1970] which the Supreme Court declared unconstitutional." It reasonably appears that the actual effect of chapter 996 of the Laws of 1972 is to close out the former Mandated Services Act and recognize its unconstitutionality instead of attempting to resurrect the same. In any event, Mandated Services (chapter 138 of the Laws of 1970) and chapter 996 of the Laws of 1972 are readily distinguishable.

At this posture of the litigation we should be guided by the action of the court in *Lemon II*.

The State, in addition to its argument of Federal unconstitutionality, also contends that the payment of the claim herein would constitute a gift of State money to a private corporation in violation of section 8 of Article VII of the New York Constitution or an audit by the Legislature of a private claim in violation of section 19 of Article III of the New York Constitution.

It is well settled that the Legislature can direct the payment of claims founded in equity and justice, even though the claim itself would not be enforceable in a court of law (*Oswego & Syracuse R.R. Co.* v. *State of New York*, 226 N.Y. 351; *Lehigh Valley R.R. Co.* v. *Canal Board*, 204 N.Y. 471). In order to justify the Legislature in recognizing a claim against the State based upon a moral obligation or founded on conceptions of equity and justice, there must be present an obligation which would be recognized by men with a keen sense of honor and a real desire to act fairly and equitably without compulsion of law (*Ausable Chasm Co.* v. *State of New York*, 266 N.Y. 326). In the present case, the sole reason why the claimant did not receive payment for the second semester of the 1971-1972 school year was the fortuitous circumstance that the declaration of unconstitutionality by the courts came before the date set for the payment of the second installment but after the rendering of by far the greater part of the services required. Thus, the great bulk of the mandated services which the claimant was expected to perform and for which, in turn, the claimant expected compensation had already been rendered prior to the issuance of the permanent injunction on June 1, 1972. Consequently, the equitable considerations present in *Lemon II* are, if anything, heightened. In the course of its decision in *Hecht Co.* v. *Bowles* (321 U.S. 321, 329) the Supreme Court addressed itself to these considerations and held that

> [f]lexibility rather than rigidity has distinguished [them]. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs.

Sections 1 and 2 of chapter 996 of the Laws of 1972 amply spell out a basis which would justify recognition of the instant claim as a moral obligation and/or founded on concepts of equity and justice.

The purpose of section 19 of Article III of the New York Constitution was "to remedy the manifest evils of special legislation in the interest of private claimants" (*Bd. Suprs. of Cayuga Co.* v. *State of New York*, 153 N.Y. 279, 288). It is readily apparent that chapter 996 is not designed to provide a recovery for any single institution and is applicable to a class which cannot readily be classified as constituting a private special interest. Accordingly, this contention of the Attorney General is without any particular merit.

Upon approaching chapter 996 it must be remembered that it is supported by a presumption of constitutionality which is not easily overcome. In addition to the presumption, it appears that this one-time payment falls within the realm of that which is constitutionally permissible pursuant to the decision of the Supreme Court in *Lemon II (supra)*.

However, it is readily apparent that it was never the intent of the Legislature that any of its funds were to be allowed for the furtherance of religious purposes. In this regard, the audit of the claims by the Court of Claims must serve the same purpose as the final post audit which was referred to in *Lemon II (supra)*. Accordingly, the burden will be upon the claimant to prove that the items of its claim are in fact solely for mandated services and the burden will be upon the Court of Claims to make appropriate findings in regard thereto.

This dissent may be concluded by observing that in *Lemon II* the court noted that the application of familiar equitable principles must be measured against the totality of circumstances and in the light of the general principle that, absent contrary direction, State officials and those with whom they deal are entitled to rely on a presumptively valid State statute, enacted in good faith and by no means plainly unlawful.

The judgment of the Court of Claims should be reversed and the claim reinstated.

Court of Appeals

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of June in the year of our Lord one thousand nine hundred and seventy-six, before the Judges of said Court.

WITNESSES,

The HON. CHARLES D. BREITEL,
Chief Judge, *Presiding*.

JOSEPH W. BELLACOSA, Clerk

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3 No.
Cathedral Academy,
Appellant,
vs.
The State of New York,
Respondent.

Be it Remembered, That on the 20th day of November in the year of our Lord one thousand nine hundred and seventy-five Cathedral Academy the appellant in this cause, came here unto the Court of Appeals, by Davis Polk & Wardwell, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The State of New York the respondent in said cause, afterwards

appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Richard E. Nolan of counsel for the appellant, and by Mrs. Jean M. Coon of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs, and the claim reinstated on the dissenting opinion by then Presiding Justice J. Clarence Herlihy at the Appellate Division (47 A D 2d 390, 396). All concur except Breitel, Ch. J., Jasen and Jones, JJ., who dissent and vote to affirm on the opinion by Mr. Justice Louis M. Greenblott at the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Claims there to be proceeded upon according to law.

Therefore, it is considered that the said order is reversed &c., AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted into the Court of Claims before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record

now remains in the said Court of Claims before the Judge thereof, &c.

s/ JOSEPH W. BELLACOSA
Clerk of the Court of Appeals of the State of New York

Court of Appeals, Clerk's Office,
Albany, July 13, 1976.

(SEAL)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ JOSEPH W. BELLACOSA

APPENDIX D — Notice of Appeal to the Supreme Court of the United States.

STATE OF NEW YORK : COURT OF CLAIMS

CATHEDRAL ACADEMY,

Claimant-Appellee,

— against —

THE STATE OF NEW YORK,

Respondent-Appellant.

Claim Number

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of New York, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, entered in this action on the 13th day of July, 1976, reversing an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, entered May 6, 1975, which affirmed a judgment of the Court of Claims, entered April 22, 1974, holding Chapter 996 of the New York Laws of 1972 unconstitutional and in violation of the First Amendment to the Constitution of the United States, and appellant appeals from each and every part of said judgment.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257, subparagraph 2.

APPENDIX D — Notice of Appeal to the Supreme Court of the United States.

Dated: Albany, New York
August 31, 1976

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Attorney General of the
State of New York

By: _____
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Attorneys for Claimant-Appellee

APPENDIX E — Chapter 996 of the 1972 Laws of New York.

CLAIMS AGAINST STATE—NONPROFIT SCHOOLS
CHAPTER 996

An Act to confer jurisdiction upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools, other than public schools for expenses incurred in rendering certain mandated services.

Approved and effective June 8, 1972.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Jurisdiction is hereby conferred upon the court of claims to hear, audit and determine the claim or claims of nonprofit schools in the state, other than public schools, against the state for reimbursement of the funds expended by them in rendering services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports required by law or regulation. The base of said claim or claims is that the State of New York represented to said schools that they would be reimbursed for such expenses incurred after July first, nineteen hundred seventy; that the said State knew that said schools were relying on said representation; that said representation

APPENDIX E — Chapter 996 of the 1972 Laws of New York.

was an effective cause of said expenses by said schools; and that without any fault on the part of said schools complete reimbursement has not been paid to them, though due and owing. As such, said claim or claims are founded in right and justice, or in law or equity.

§ 2. In hearing, auditing and determining such claim or claims, the court of claims is hereby authorized to consider, inter alia:

(a) That prior to July first, nineteen hundred seventy, said nonprofit schools, rendered services for examination and inspection in connection with administering, grading and the compiling and reporting of the results of tests and examination, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualification and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation;

(b) That by a chapter of the laws of nineteen hundred seventy, it was determined and declared as a matter of legislative finding:

> **"That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.**
>
> **That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as**

required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

And that nonpublic schools of the state are responsible for the education of more than eight hundred fifty thousand pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonable assisting such services."

(c) That in furtherance of said policy, appropriations were made to the education department to enable the department to reimburse such schools for the rendering of such services;

(d) Based on the representation of the State that reimbursement would be made for such services, such schools already in fiscal crisis, by budgetary allocations and other methods made available the necessary personnel to perform such services;

(e) That the federal courts, by various orders enjoined payments to such schools. As a result reimbursement for the full period July first, nineteen hundred seventy-one to June thirtieth, nineteen hundred seventy-two, has not been made to such schools, although all such services were or will be duly performed;

(f) That such schools during such period did incur expenses in providing the mandated services in reliance upon said representation of reimbursement;

(g) That but for this claim or claims complete reimbursement to such schools would not be made and such schools are thus without legal right to recover for said expenses;

(h) That the legislature recognizes a moral obligation to provide a remedy whereby such schools may recover the complete amount of expenses incurred by them prior to June thirtieth, nineteen hundred seventy-two in reliance on the said representation.

§ 3. If the court finds that such claim or claims or any of them were founded in right and justice or in law and equity against the state of New York, and are in right and justice presently payable thereby, the state shall be deemed to have been liable therefor and such claim or claims shall constitute legal and valid claims against the state, and the court may award and render judgments for the claimants as shall be just and equitable, notwithstanding the lapse of time since any such claim or claims or any parts thereof accrued, or the failure to do any act in relation to the presentation of such claims or any of them within the time prescribed by law, but no award shall be made or judgment rendered hereunder against the state unless such claim shall be filed with the court of claims within ninety days from the passage of this act, nor if such claim, as between citizens of the state, would be barred by lapse of time.

§ 4. This act shall take effect immediately.